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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-758

UNITED TRANSPORTATION UNION, *Petitioner,*

v.

CHICAGO AND NORTH WESTERN RAILROAD COMPANY, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Respondent railroad sought an injunction against a strike by petitioner union on the ground that, while the union in form had gone through all the "major disputes" procedures of the Railway Labor Act (45 U.S.C. §§ 151-160), including conferences and mediation, it had not done so in a manner that satisfied its duty under Section 2 First of the Act to "exert every

reasonable effort" to settle the dispute. The district court held that the union had violated Section 2 First during conferences and mediation and ordered the parties to resume bargaining. Then, after further conferences, but without requiring the parties to seek further mediation, the district court held that the union had satisfied Section 2 First, had exhausted all the procedures required by the Act, and therefore was free to strike. The court of appeals reversed, holding that the Section 2 First obligation must be met in mediation as well as in initial conferences and thus that the union had not exhausted the procedures of the Act because it had not participated in mediation in good faith.

The question presented is: Could the union exhaust the procedures prescribed by the Act without exerting every reasonable effort to settle the dispute in mediation under the auspices of the National Mediation Board?

STATEMENT

In 1963 and 1964 through legislation and ensuing arbitration,[1] virtually all the nation's railroads, including respondent Chicago & North Western (the "C&NW" or "carrier"), were permitted to reduce the size of many of their train crews, generally from

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[1] To halt a nationwide strike over railroad proposals for changes in operating rules, Congress enacted a statute, 77 Stat. 132 (1963), requiring arbitration between the railroads and their operating unions over the use of "firemen" on diesels and the size of train crews—"crew consist." After hearings, Arbitration Board No. 282 (1963) remanded the crew consist question to negotiation and arbitration on individual railroads pursuant to national guidelines set by that Board. Several agreements and awards reached under this procedure permitted the C&NW to operate 215 crews with one brakeman instead of two. *App. D to Pet.*, at p. 12a.

two brakemen to one. In 1965 the predecessor of the United Transportation Union (the "UTU" or "union") served notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) demanding restoration of two brakemen on all crews; and the railroads served counter-notices proposing additional crew reductions. In 1968 and 1969 the C&NW and the UTU held bargaining conferences on these notices and, in 1969, mediation sessions under the auspices of the National Mediation Board (the "NMB") pursuant to Section 5 (45 U.S.C. § 155). Failing agreement, the NMB proffered arbitration, which the UTU rejected. The NMB then terminated its mediatory services, and the carrier subsequently commenced this action to enjoin a threatened strike. *App. D to Pet.*, at pp. 12a, 18a-25a.

The C&NW contended that the union had in conferences and mediation failed "to exert every reasonable effort" to settle the dispute in violation of Section 2 First of the Act (45 U.S.C. § 152 First), the "good faith bargaining" provision of the Act. The district court dismissed on the ground that Section 2 First was not justiciable (*App. H to Pet.*, p. 107a), and the court of appeals affirmed. *Chicago & N.W. Ry.* v. *United Transportation Union*, 422 F.2d 979 (7th Cir. 1970), *App. G to Pet.*, p. 88a. This Court reversed, however, 402 U.S. 570 (1971), *App. F to Pet.*, p. 60a, holding Section 2 First enforceable by injunction and remanding for a determination of the case on the merits.

On remand the district court found that the union had violated Section 2 First in conferences and mediation by refusing to bargain with the carrier at all on two subjects and by a "take it or leave it" stance in the dispute overall. 330 F.Supp. 646 (N.D. Ill. 1971),

App. E to Pet., at pp. 52a-53a. The court therefore enjoined the union from striking until it had exhausted the procedures required by the Act—including mediation—in compliance with Section 2 First and directed further bargaining. *Id.* at 57a-58a. The parties held new conferences; and at a conference on the day before a second hearing by the district court, the carrier asked the union to join with it in requesting the NMB to reassign a mediator to the case. On the morning of the hearing the UTU refused. The district court then held, nevertheless, that the UTU had bargained in compliance with Section 2 First during the new conferences, and that by that step alone—without resort to mediation—the union had exhausted the procedures of the Act and gained the right to strike. 336 F. Supp. 1149 (N.D. Ill. 1971), *App. D to Pet.*, at pp. 39a *et seq.* An injunction pending appeal was nevertheless issued.[2] The court of appeals reversed, holding that the UTU could not strike until it had also gone through the mediation step in the Act's procedures at a time when the union was in compliance with Section 2 First. The core of its decision was this:

> "However, as the [Supreme] Court points out in the opinion at [402 U.S.] 578: 'The strictest compliance with the formal procedures of the Act is meaningless if one party goes through the motions with a "desire not to reach an agreement"'. That is exactly what happened here when the parties previously went through each step of the procedures. The District Court has found on remand of the case that neither party acted in good faith

[2] The UTU appealed from the granting of the injunction pending appeal, and the court of appeals affirmed. *App. A to Pet.*, at p. 4a. That issue is the subject of the UTU's separate petition for certiorari in No. 72-789.

in exerting every reasonable effort to settle their differences. Having so tainted every step of the required procedures of the Act, it is necessary that they revisit each step in a good faith effort to settle their dispute. The District Court, however, only required that the joint conference step be invoked. We submit that before self-help is permitted that the parties must also exhaust the next step, *i.e.*, the National Mediation Board. This they have not done. This latter step is the very heart of the Act, because it brings into play the mediation expertise of the Board. Still, this most influential and effective step has not in good faith ever been exerted." *App. A to Pet.*, at p. 5a.

In view of its holding that good faith participation in mediation is required, the court of appeals did not reach the C&NW's further contention that the union had not bargained in good faith in the conferences following the remand, other than to state that "the findings of the District Court as to the good faith of the parties in the joint conference stage are such that if they hereafter demonstrate their good faith in mediation, those findings will stand as approved." *App. A to Pet.*, at p. 6a. The UTU's petition for rehearing *en banc* was denied, "no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing." *App. C to Pet.*, p. 8a.

REASONS FOR DENYING THE WRIT

The court of appeals aptly stated the issue in this case to be "what steps of the statutory procedure must be revisited when there has not been a good faith compliance with Section 2 First?" *App. A to Pet.*, at p. 3a. That court resolved the issue by holding that inasmuch

as the lack of good faith in the prior bargaining "tainted every step"—including conferences and mediation—"of the required procedures of the Act," the parties must "revisit each step"—including conferences and mediation—"in a good faith effort to settle their dispute." *Id.* at 5a. In its petition the UTU argues first, that the court of appeals was not required by this Court's June 1971 decision in the case to decide the issue at all and therefore should not have decided it; and second, that further conferences and mediation are not appropriate in the particular circumstances of this case. We think it evident, however, that the issue presented by this case does not merit review because (1) the decision of the court of appeals does not conflict with any decision of this Court and complies with this Court's prior decision in this case, (2) the decision of the only other court of appeals which has had occasion to examine this issue is consistent with that of the court below, (3) the union's arguments against further conferences and mediation turn on the complex history of the bargaining in this particular case, and (4) the decision below is supported by the heavy reliance Congress placed upon mediation in the Railway Labor Act.

1. When this Court held Section 2 First judicially enforceable, it did not determine whether the UTU had in fact violated the Act and thus did not determine the procedure to be followed if such a violation were found. In dissent Mr. Justice Brennan stated with respect to those matters that the Court had provided "absolutely no guidance as to where in the bargaining scheme the parties are to be remanded." 402 U.S. at 597. The UTU in its petition states that this Court "made no reference to whether the parties should be required to

re-visit and re-do any step in the procedures of the" Act (*Pet.*, p. 17.) and contends, therefore, that the court of appeals by deciding the issue "misconceived, misconstrued and failed to apply the decision of this Court" (*Pet.*, pp. 16-18). In other words, the UTU contends that the court below should not have determined the obligations of a party who has violated the Act and wishes to purge itself. The UTU says that such a party should not be required to "revisit" any steps, but nowhere does the union suggest what, if anything, that party should be required to do. The union apparently contends that there are no sanctions for one who has violated Section 2 First, the very issue settled to the contrary by this Court in its 1971 decision in this case.

In fact, this Court did not leave this issue open. The basis for this Court's decision was that the "propriety of judicial enforcement" of Section 2 First turns on making the statutory procedures work, that is,

> "on the importance of the duty in the scheme of the Act, the capacity of the courts to enforce it effectively, and the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory." 402 U.S. at 578.

This Court found that the Section 2 First duty is "central to the effective working of the Railway Labor Act," and that "[t]he strictest compliance with the formal procedures of the Act is meaningless if one party [merely] goes through the motions. . . ." *Ibid.* These principles clearly required the court of appeals both to decide the issue that it did and to decide it in the manner that it did. If a party which merely "goes through the motions" of conferences and mediation need not repeat

those steps while exerting every reasonable effort to settle in compliance with Section 2 First, there cannot be an "effective working" of the Act's required procedures, and the "right of the aggrieved party" to conferences and the assistance of the Mediation Board must surely "prove illusory."

The UTU asserts (*Pet.*, pp. 15-16) that the issue decided below is of huge importance, but it has not documented that assertion and offers no view as to the correct resolution of the issue, except to assert that the resolution of the court of appeals was wrong. Review by this Court should not be premised on naked assertions that an issue is important and was wrongly decided below.

2. Moreover, the decision below does not conflict with that of any other court. Only one court has yet dealt with the question of the procedure to be followed after a violation of Section 2 First, and the conclusion there was wholly consistent with that of the court below. In *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n.*, 416 F.2d 633 (4th Cir. 1969), the Act's procedures—including conferences and mediation—had been formally exhausted. The court of appeals affirmed an injunction against a strike on the ground that the union had not bargained in good faith, saying:

> "Restraining the parties from self-help, through strikes or otherwise, until they have complied with the duty to bargain in good faith vindicates the congressional purpose of providing machinery to prevent strikes without creating an irreconcilable conflict with the Norris-LaGuardia Act. Restraint conditioned in this respect does not deny the right to strike over a major dispute; but it delays

> this right until the union satisfies the mandate of the Railway Labor Act." 416 F.2d at 636.

The court added that the injunction should be dissolved "when the union complies with the Act," that is, "when proceedings under the Act have been exhausted." *Id.* at 638. The Act's "machinery" referred to includes mediation; and the "congressional purpose of providing machinery to prevent strikes" could only be vindicated by requiring use of that machinery again when, as in the case at bar, the formal steps in the machinery have hitherto been taken faultily.

The UTU contends (*Pet.*, pp. 18-19) that *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581 (D.C. Cir. 1967), conflicts with the decision below. But that case presents no conflict, and indeed it illustrates another reason for denying review—the unusual facts of this case on which the UTU's grounds for review are truly based. When the UTU in 1965 served its Section 6 notices the railroads disclaimed any duty to bargain, because the notices were served prior to the expiration of the Award of Arbitration Board No. 282, which had resolved the national crew consist dispute. In *Akron* the court held that the railroads' position was incorrect, that the railroads had therefore breached their duty to bargain in good faith at the conference stage, and accordingly that the railroads had "forsaken their right to insist on conferences" prior to mediation. 385 F.2d at 597. The UTU claims that the decision below conflicts with *Akron* because in the case at bar the court of appeals treated as pre-mediation conferences the new negotiations ordered by the district court after finding a violation of Section 2 First. But whether or not the C&NW had a right to "insist" upon

pre-mediation conferences after *Akron,* the parties in fact engaged in a long series of conferences prior to mediation in 1968 and 1969. *App. D to Pet.,* at pp. 18a-19a. And the district court in its first decision on remand made a finding—never challenged by the UTU—that the "union did not at any time in the parties' conferences in 1968 and 1969 contend that full-fledged bargaining had been impaired by the carrier's refusal to discuss the union's notices in the summer of 1965." *App. E to Pet.,* at p. 53a. In any event, *Akron* did not hold that a party who does not bargain in good faith while participating in mediation cannot thereafter be required to do so before resorting to self-help and, indeed, did not involve that issue. Hence, the decision below in this case could not and does not conflict with the *Akron* decision.

3. The UTU urges additional issues which turn on the peculiar facts of this case and are accordingly inappropriate for review by this Court. The first (*Pet.,* pp. 19-22) is that participation in further mediation in the manner prescribed by Section 2 First is not required because more than ten days have elapsed since the close of the 1971 conferences, and mediation has been neither invoked by the parties nor proffered by the NMB. Section 6 of the Act requires the parties to refrain from self-help

> "where . . . conferences are being held . . ., or the services of the Mediation Board have been requested . . ., or said Board has proffered its services . . ., unless a period of ten days has elapsed *after termination of conferences* without request for or proffer of the services of the Mediation Board." (Emphasis added).

The second argument (*Pet.,* pp. 22-23) is that since the C&NW has not invoked mediation it has not exerted

"every reasonable effort to settle" the dispute within the meaning of Section 8 of the Norris-LaGuardia Act (29 U.S.C. § 108) and is therefore barred from injunctive relief.[3] Neither contention can be reconciled with the facts of record which demonstrate that there was no "termination" of the new pre-mediation conferences before the hearing by the district court. At the conference on the eve of the hearing the carrier asked the union to join in requesting the NMB to reassign a mediator to this dispute. On the morning of the hearing the union refused. *App. D to Pet.*, at p. 39a. Neither party took the position in the district court that there was a "termination of conferences." One ground advanced by the UTU against an injunction pending appeal was that it was the union's "intention to negotiate" further with the carrier, as directed by the union's President, and it did not want these conferences to be "under a threat of an injunction." (*Tr.* of January 6, 1972, *Record*, pp. 83, 87-88; see also *Tr.* of December 22, 1971, p. 11). The UTU

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[3] Apart from the facts, the carrier takes the position that Section 8 of the Norris-LaGuardia Act is not applicable in suits to enjoin a violation of the Railway Labor Act. See the explanation of Representative LaGuardia of his bill at 75 *Cong. Rec.* 5499 (1932) and the pertinent decisions of this Court: *Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. 570, 581 (1971); *Brotherhood of R.R. Trainmen* v. *Chicago R. & I. R.R.*, 353 U.S. 30, 40-41 (1957); *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 458 (1957); *Virginian Ry.* v. *System Federation*, 300 U.S. 515, 562-563 (1937); *Brotherhood of R.R. Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952); *Brotherhood of Locomotive Engrs.* v. *Louisville & N. R.R.*, 373 U.S. 33, 42 (1963); and especially *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232, 237 (1949), where the precise issue of the applicability of Section 8 was raised (*Brief for Respondent*, pp. 16-17, No. 16, O.T. 1949) and the Court held Norris-LaGuardia inapplicable without attempting to distinguish among that Act's various provisions.

will not, we think, deny that conferences have in fact continued on throughout the appellate process. And even were there a genuine factual dispute, it would only illustrate further why the underlying issue decided below ought not be reviewed by this Court in the context of this case.[4]

The UTU's last asserted ground for review (*Pet.*, p. 23) is that because the court of appeals "approved" the finding that the UTU had complied with Section 2

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[4] Even if the facts were otherwise and conferences had terminated, mediation is not, as the UTU asserts, "permissive" for one who would exhaust the Act's procedures and exercise self-help. Section 2 First requires *every* reasonable effort to settle disputes, not merely conferences, "in order to avoid any interruption to commerce or to the operation of any carrier. . . ." *Cf. Brotherhood of R.R. Trainmen* v. *Toledo, P. & W. R.R.*, 321 U.S 50, 57-60 (1944), in which this Court construed the "every reasonable effort" language in Section 8 of the Norris-LaGuardia Act to require exhaustion of all three "conciliatory device[s]" provided by the Railway Labor Act—conferences, mediation, and arbitration. The Court explained that to construe the "every reasonable effort language" "as requiring but one of the three methods to be used, when the other two are equally available, would emasculate the language and would defeat the purpose and the policy of the statute." *Id.* at 60. This Court in one of its landmark Railway Labor Act cases, *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 725 (1945), stated that the "statutory scheme" of the Railway Labor Act for resolving major disputes "retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation" and that the "*parties are required to submit to the successive procedures designed to induce agreement.* § 5 First (b)." (Emphasis added). The Court added that these "compulsions go only to insure that those procedures are exhausted before resort can be had to self-help." Of no weight is the contrary dictum in *International Ass'n of Machinists* v. *NMB*, 425 F.2d 527, 537 (D.C. Cir. 1970), relied on by the UTU (*Pet.*, p. 20). The statement was made in a general description of the Act without analysis or citation of authority in a case in which the point was neither in issue nor briefed.

First in the new conferences, no "unlawful acts" have been committed to take this dispute out of the anti-injunction provisions of Section 7 of the Norris-LaGuardia Act (29 U.S.C. § 107).[5] But if the court of appeals was correct in holding that mediation is also required, Norris-LaGuardia does not bar an injunction against a strike pending exhaustion of all the procedures required by the Railway Labor Act—including mediation. *Chicago & N.W. Ry.* v. *United Transportation Union,* 402 U.S. at 581-584.

4. Finally, the decision below serves the central policies of the Railway Labor Act in "major disputes." The court of appeals correctly recognized that resort to the NMB "is the very heart of the Act, because it brings into play the mediation expertise of the Board" and is the "most influential and effective step" in the Act's procedures. *App. A to Pet.,* at p. 5a. The legislative history of the Act is replete with explanations of the critical role of mediation made by the unions' spokesman, Donald R. Richberg, whose statements "are entitled to great weight in the construction of the Act." *Chicago & N.W. Ry.* v. *United Transportation Union,* 402 U.S. at 576. For example, Mr. Richberg explained that upon failure of conferences, "then there is a public interest" in the dispute, a necessity "to bring in the possibility of public intervention to promote peace and harmony," and the "place for the intervention of the

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[5] The court below did not "approve" the findings by the district court concerning the bargaining in the new conferences, but explicitly stated that it did "not pass upon the action of the District Court with reference to its findings of good faith efforts of the parties in their joint conferences," other than to note that those findings "are such that if they [the parties] hereafter demonstrate their good faith in mediation, those findings will stand as approved." *App. A to Pet.,* at p. 6a.

Government Board of Mediation." "Railroad Labor Disputes," *Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 7180,* 69th Cong., 1st Sess. (1926), pp. 13-14. Reliance upon mediation, explained Mr. Richberg, was based upon "a continuing history of the increasing success of mediation" in the railroad industry (*id.* at 294), for "the record of mediation" was such that "all parties presenting this bill are seeking now [after the failure of the Railroad Labor Board] to return to the form of Government intervention in industrial differences which has shown in the past the greatest measure of success." (*Id.* at 14; see also pp. 18, 48-49, 52-53, 102-103). This reliance has manifestly proven justified, for the NMB has recently stated that its "record shows a settlement rate of 97.2% of disputes mediated under the auspices of the National Mediation Board, on a yearly average basis." NMB, *Administration of the Railway Labor Act by the National Mediation Board 1934-1970* (1970), p. 104. Indeed, although prospects for settlement through mediation seem slim in a particular case, the policies of the Act nevertheless require resort to mediation. As the Court of Appeals for the District of Columbia Circuit said in *International Ass'n of Machinists* v. *NMB,* 425 F.2d 527, 541 (1970),

> "What is voluntary about mediation, including mediation under this Act, is the decision to accept or reject the result available from the mediation process. What is involuntary about mediation under this Act is the obligation to engage in the mediation process even though a party is not unreasonable from his point of view in his conviction that further mediation is futile. . . . However skeptical of success the court may be it cannot

obliterate even the slim chance of success that may ensue from exhaustion of the process entrusted by Congress to the Mediation Board."

The court of appeals attached appropriate importance to the mediation function in holding that following a failure to exert every reasonable effort to settle disputes in compliance with Section 2 First, in "every step of the required procedures of the Act," the parties are required to "revisit each step in a good faith effort to settle their disputes." *App. A to Pet.*, at p. 5a.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

FRANCIS M. SHEA
RICHARD T. CONWAY
DAVID BOOTH BEERS

SHEA AND GARDNER
734 Fifteenth Street, N. W.
Washington, D. C. 20005

RICHARD M. FREEMAN
JAMES P. DALEY
ROBERT SCHMEIGE

400 West Madison Street
Chicago, Illinois 60606

Attorneys for Chicago and North Western Railway Company

Of Counsel:

SHEA AND GARDNER
734 Fifteenth Street, N. W.
Washington, D. C. 20005

Dated: December 22, 1972